A

Ooi Hun Seng v Public Prosecutor

B HIGH COURT (PENANG) — CRIMINAL REVISION NO PA-44–32–06 OF 2020
MOHD RADZI JC
17 SEPTEMBER 2020

C *Criminal Law — Revision — Application for revision — Applicant applied for revision of sessions court's decision — Applicant plead guilty for offence under s 326 of Penal Code and sentenced to ten years imprisonment by sessions court — Applicant appealed against sentence in High Court was allowed — Applicant appealed in Court of Appeal against conviction and sentence — Case remitted* D *back to sessions court — Whether court was functus officio — Whether revision could be filed when there was pending appeal — Whether there was miscarriage of justice against applicant — Penal Code s 326*

This was an application for a revision of the decision of the sessions court made E on 18 October 2018 ('the application'). The applicant was charged for an offence under s 326 of the Penal Code ('the PC') read together with s 326A of the PC for causing grievous hurt by a dangerous weapon to the victim, Ooi Hun Khoon. The applicant pleaded guilty to the charge and was sentenced to ten years imprisonment and fined in the amount of RM10,000 in default an F additional six months imprisonment will be imposed. The applicant was dissatisfied with the sentence and appealed to the High Court vide Criminal Appeal PA-42H-26–10 of 2018 ('the first appeal'). The first appeal was allowed and the imprisonment term was reduced to seven years. The applicant appealed to the Court of Appeal vide Appeal Case No P-09(H)-220–05 of 2019 ('the G second appeal) challenging the legality of the applicant's plea of guilt and conviction. At the hearing of the second appeal, the Court of Appeal could not hear arguments of the issues since the appeal was only with regards to the issue of adequacy of sentence. The Court of Appeal adjourned the hearing pending the filling of an application for a revision of the sessions court's decision with H regards to the legality of the conviction. In opposing the application, the respondent submitted that the court was functus officio since it had already heard and made its decision on the applicant's appeal against sentence and the court could not hear the application as it would amount to revisiting its own decision after the first appeal was heard. The other issues for determination I were: (a) whether the application for revision should not be allowed when there was a pending appeal; and (b) whether there was a miscarriage of justice against the applicant.

Held, allowing the application for revision, setting aside conviction and

sentence and remitting back case to sessions court for retrial:

(1) Whether this court was functus officio, the answer was negative because the application was made on an issue that was not ventilated and decided upon at the first appeal. The issue of legality of the plea of guilty and the ensuing conviction was only identified at the second appeal by a new counsel. The application was necessary as a step in aid to bring to the attention of the court of the injustice that had taken place before the trial court and to invoke the revisionary powers of the court. The argument in favour of saying that the court was already functus officio after the first appeal was heard was without persuasive merit (see para 15).

(2) Since a revision was a step in aid and was not a continuation of the trial of appeal, then there should not be any impediment for the application to be filed even when there was an appeal pending provided that the application was made bona fide to correct a miscarriage of justice. There was no bar to the court in hearing the merits of the application notwithstanding that an appeal was pending and that appeal sought to impugn the decision of the court (see paras 17 & 23).

(3) As the public prosecutor conceded that the facts and evidence were absent to disclose the elements of the offence under s 326 of the PC as no fact or statement that the hurt inflicted was grievous, no medical report was offered to prove that the hurt was inflicted in the victim and no evidence that the victim fell within the class of persons defined under s 326A of the PC to justify the enhanced punishment, it was plain that the sessions court had fallen into error in accepting the accused's plea of guilty. There was a miscarriage of justice and the miscarriage must be corrected (see paras 24–25 & 29).

[Bahasa Malaysia summary

Ini adalah permohonan untuk semakan keputusan mahkamah sesyen yang dibuat pada 18 Oktober 2018 ('permohonan tersebut'). Pemohon telah dituduh atas kesalahan di bawah s 326 Kanun Keseksaan ('Kanun tersebut') yang dibaca bersama-sama dengan s 326A Kanun tersebut kerana menyebabkan kecederaan parah menggunakan senjata berbahaya kepada mangsa, Ooi Hun Khoon. Pemohon mengaku bersalah atas pertuduhan tersebut dan dijatuhkan hukuman penjara sepuluh tahun dan denda berjumlah RM10,000 sekiranya ingkar, tambahan enam bulan penjara akan dikenakan. Pemohon tidak berpuas hati dengan hukuman tersebut dan mengemukakan rayuan ke Mahkamah Tinggi melalui Rayuan Jenayah PA-42H-26–10 Tahun 2018 ('rayuan pertama'). Rayuan pertama dibenarkan dan hukuman penjara dikurangkan kepada tujuh tahun. Pemohon mengemukakan rayuan ke Mahkamah Rayuan melalui Kes Rayuan No P-09(H)-220–05 Tahun 2019 ('rayuan kedua) yang mencabar kesahihan pengakuan bersalah dan sabitan pemohon. Pada pendengaran rayuan kedua,

Mahkamah Rayuan tidak boleh mendengar hujahan pada isu-isu tersebut memandangkan rayuan tersebut hanya berkaitan dengan isu kecukupan hukuman. Mahkamah Rayuan menangguhkan pendengaran sementara menunggu pemfailan permohonan untuk semakan keputusan mahkamah sesyen berkenaan dengan kesahihan sabitan tersebut. Dalam menentang permohonan tersebut, responden menghujahkan bahawa mahkamah telah functus officio oleh kerana ia telah mendengar dan membuat keputusannya pada rayuan pemohon terhadap hukuman dan mahkamah tidak boleh mendengar permohonan tersebut kerana ia terjumlah kepada menyemak semula keputusannya sendiri setelah rayuan pertama didengar. Isu lain untuk ditentukan adalah: (a) sama ada permohonan semakan tidak boleh dibenarkan ketika terdapat rayuan yang belum selesai; dan (b) sama ada terdapat ketidakadilan terhadap pemohon.

Diputuskan, membenarkan permohonan untuk semakan, mengetepikan sabitan dan hukuman dan menolak kembali kes ke mahkamah sesyen untuk perbicaraan semula:

(1) Sama ada mahkamah ini adalah functus officio, jawapannya adalah negatif kerana permohonan dibuat atas isu yang tidak dihujahkan dan diputuskan semasa rayuan pertama. Isu kesahihan pengakuan bersalah dan sabitan berikutnya hanya dikenal pasti semasa rayuan kedua oleh peguamcara baru. Permohonan tersebut adalah penting sebagai langkah dalam membantu untuk mendapatkan perhatian mahkamah terhadap ketidakadilan yang telah terjadi di hadapan mahkamah perbicaraan dan untuk mengguna pakai kuasa semakan oleh mahkamah. Penghujahan yang mengatakan bahawa mahkamah sudah menjadi functus officio setelah rayuan pertama didengar adalah tanpa merit meyakinkan (lihat perenggan 15).

(2) Oleh kerana semakan adalah langkah dalam membantu dan bukannya merupakan perlanjutan perbicaraan rayuan, maka tidak seharusnya terdapat halangan bagi permohonan untuk difailkan walaupun sekiranya terdapat rayuan yang belum didengar dengan syarat bahawa permohonan tersebut dibuat dengan suci hati untuk membetulkan ketidakadilan. Tidak ada batasan bagi mahkamah untuk mendengar merit permohonan tersebut walaupun rayuan yang belum didengar dan rayuan tersebut memohon untuk mempersoalkan keputusan mahkamah (lihat perenggan 17 & 23).

(3) Oleh kerana pendakwa raya mengakui bahawa ketiadaan fakta dan keterangan untuk memenuhi unsur-unsur kesalahan di bawah s 326 Kanun tersebut kerana tidak ada fakta atau pernyataan bahawa kecederaan yang didatangkan adalah parah, tiada laporan perubatan yang dikemukakan untuk membuktikan bahawa kecederan didatangkan ke atas mangsa dan tiada keterangan bahawa mangsa terjumlah dalam

kelas orang yang dimaksudkan di bawah s 326A Kanun tersebut untuk membenarkan hukuman ditingkatkan, ianya jelas bahawa mahkamah sesyen telah terkhilaf dalam menerima pengakuan bersalah tertuduh. Terdapat ketidakadilan dan ketidakadilan tersebut mesti diperbetulkan (lihat perenggan 24–25 & 29).]

Cases referred to

Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69; [1987] CLJ Rep 163, SC (refd)
Ong Seh Sen v PP [2010] 7 CLJ 220, HC (refd)
PP v Chandrasegaran Sunthiran [2020] MLJU 338; [2020] 6 CLJ 741, HC (distd)
PP v Ismail bin Ibrahim [1998] 3 MLJ 243, HC (refd)
PP v Kulasingam [1974] 2 MLJ 26; [1974] 1 LNS 118 (refd)
PP v Margarita B Cruz [1988] 1 MLJ 539; [1987] 1 LNS 129 (refd)
PP v Soon Seng Sia Heng [1979] 2 MLJ 170; [1979] 1 LNS 81, FC (refd)
Shaiful Azmi bin Sabri v Pendakwa Raya [2020] MLJU 1214, CA (refd)
Sukma Darmawan Sasmitaat Madja v PP [2007] 5 MLJ 666; [2007] 4 CLJ 697, CA (distd)
Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; [2007] 1 MLJU 517; [2007] 1 CLJ 565; [2007] AMR 643, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Courts of Judicature Act 1964 ss 31, 35(1)
Criminal Procedure Code s 325
Dangerous Drugs Act 1952 s 68(1)(a)
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) s 10
Penal Code ss 320, 326, 326A

Baldev Singh Bhar (Syarikat Baldev Bhar) for the appellant.
Yasinnisa Begam bt Seeni Mohideen (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the respondent.

Mohd Radzi JC:

MATTER BEFORE THIS COURT

[1] This an application for a revision of the decision of the sessions court made on 18 October 2018 ('application'). This application is supported by the affidavit of Dato' Baldev Singh Bhar, learned counsel for the applicant.

A BACKGROUND

[2] The applicant was charged for an offence under s 326 of the Penal Code ('the PC') read together with s 326A of the same Act for causing grievous hurt by a dangerous weapon to Ooi Hun Khoon ('victim').

B

[3] Sections 326 and 326A of the PC read as follows:

326 Voluntarily causing grievous hurt by dangerous weapons or means

Whoever, except in the case provided by section 335, voluntarily causes grievous
C hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death or any scheduled weapon as specified under the Corrosive and Explosive Substances and Offensive Weapons Act 1958, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive
D substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

326A Punishment for causing hurt to spouse, former spouse, etc

E
(1) Whoever causes hurt to his spouse or former spouse, a child, an incapacitated adult or other member of the family and commits an offence under section 323, 324, 325, 326, 334 or 335 shall be punished with imprisonment for a term which may extend to twice of the maximum term for which he would have been liable on conviction for that offence
F under the relevant section notwithstanding any other punishment provided for that offence.

(2) For the purpose of this section, 'spouse', 'child', 'incapacitated adult' and 'other member of the family' have the meanings assigned to them in section 2 of the Domestic Violence Act 1994 [Act 521].

G

[4] The charge ('charge') against the applicant read as follows:

Bahawa kamu pada 02/09/2018 jam di antara 7.00 petang hingga 8.00 malam di 111-V Noordin Street, Ghaut Flat, 10300 Georgetown, di dalam Daerah Timur Laut , dalam Negeri Pulau Pinang, didapati telah menikam seorang lelaki bernama
H Ooi Hun Khoon berumur 48 tahun, No KP: 671213–07–5047 dengan cara menikam dengan menggunakan gunting. Oleh yang demikian, kamu didapati melakukan kesalahan di bawah Seksyen 326 Kanun Keseksaan dan dibaca bersama dengan Seksyen 326A Kanun Keseksaan.

I PROCEEDINGS LEADING TO THE APPLICATION

[5] The applicant was arrested on 2 September 2018 and was charged before the sessions court on 18 October 2018. The applicant pleaded guilty to the charge. He was sentenced to ten years imprisonment and fined in the

amount of RM10,000, in default an additional six months imprisonment will be imposed. The applicant was dissatisfied with the sentence and appealed to the High Court vide Rayuan Jenayah PA-42H-26–10 Tahun 2018 ('first appeal'). The appeal was heard by Akhtar bin Tahir J and His Lordship allowed the appeal with respect to the imprisonment term only which was reduced from ten years to seven years.

[6] The applicant being further dissatisfied with that decision appealed to the Court of Appeal vide appeal case number P-09(H)-220–05 of 2019 ('second appeal'). The notice of appeal to the Court of Appeal was filed by the applicant through the prison authority. At the hearing of the appeal, a new counsel was appointed by the National Legal Aid Foundation to represent the applicant. Learned counsel for the applicant raised issues that challenged the legality of the applicant's plea of guilty and conviction. At the hearing of the second appeal, the Court of Appeal opined that the court could not hear arguments on those issues since the appeal was only with regards to the issue of adequacy of sentence. The learned panel of the court then adjourned the hearing pending the filing of an application for a revision of the sessions court's decision with regards to the legality of the conviction. Hence, the application before this court ('application').

THE APPLICATION

[7] In his application the applicant sets out the following main issues that seek to justify the setting aside of the conviction. They are:

(a) that the facts of the case appearing as exh P1 in the proceedings before the sessions court and the charge did not prove the elements of the offence as it failed to state the nature of the hurt;

(b) no medical report was tendered to the court to prove that the hurt was grievous;

(c) no evidence was tendered to prove that the victim was a person who fell within the class of persons as provided under s 326A of the Act; and

(d) the psychiatric assessment of the applicant that was prepared by Hospital Bahagia Ulu Kinta dated 15 October 2018 for consideration of the sessions court did not clearly show whether on the date the applicant committed the offence he was in a sane and conscious state of mind.

[8] In opposing the application the respondent submitted that this court was functus officio since it had already heard and made its decision on the applicant's appeal against sentence and therefore this court cannot now hear this application as it would amount to revisiting its own decision after the first appeal was heard. In support of her submission learned deputy public

prosecutor relied on the decision of the High Court in *Public Prosecutor v Chandrasegaran Sunthiran* [2020] MLJU 338; [2020] 6 CLJ 741.

POWER OF REVISION

[9] The power of revision by the High Court are found in s 31 of the Courts of Judicature Act 1964 and s 325 of the Criminal Procedure Code:

> Courts of Judicature Act
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> 31 Revision of criminal proceedings of subordinate courts
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> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.
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> Criminal Procedure Code
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> 325 Powers of Judge on revision
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> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
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> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.
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> (3) Nothing in this section shall be deemed to authorize a Judge to convert a finding of acquittal into one of conviction.

[10] Abdul Hamid CJ (as he then was) in the Supreme Court case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] CLJ Rep 163, described the duty of the High Court in exercising its revisionary powers as follows:

> Duty of High Court
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> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
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> The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

[11] In the oft quoted decision in *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26; [1974] 1 LNS 118, Hashim Yeop Sani J (as he then was) stated the following on the powers of a court in a revision:

The powers of the High Court in revision are amply provided under s 325 of the Criminal Procedure Code subject only to sub-ss (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

DELIBERATIONS BY THIS COURT

On the issue of whether this court is functus officio

[12] In the case of *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 MLJU 517; [2007] 1 CLJ 565; [2007] AMR 643, the Federal Court speaking through Richard Malanjum CJ Sabah and Sarawak (as he then was) expressed the following:

[32] It has been said that a 'revision is not a right and is only a procedural facility afforded to a party, while an appeal is a statutory right conferred on a party. It cannot be said that a proceeding in revision is a continuation of the suit, appeal or trial. It is only a step-in-aid for invoking the powers of superintendence by the sessions judge and the High Court for correcting irregularities if any, in the judgments and orders of the subordinate courts. Interference in revision being a discretionary power vested in the superior courts, a revision petition cannot be considered to be a continuation of the proceedings pending in the trial court or the appellate court' (see *Kunhammad v Abdul Kader* [1977] KLT 840). Similarly, in *Ku lzham bin Ku Adnan v Public Prosecutor* [1998] 5 MLJ 720; [1998] 2 CLJ 956 it was said that the 'object of a revision is to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted in some injury to the due maintenance of law and order or in some undeserved hardship to individuals. The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court.

[13] From that statement of the law it is this court's view that since a revision is postured as a step in aid and not a continuation of a trial or an appeal, the court's powers of revision should be accessible to an accused at any stage of the proceedings provided that its purpose is to correct any miscarriage of justice at the lower courts. Based on established decisions, the access to the court's power cannot however, be used as a back door access to an appeal when the matter in dispute is appealable and no appeal was filed. Whilst the overriding consideration is whether there was a miscarriage of justice occasioned on the accused resulting from an error, incorrectness or impropriety of a conviction or sentence, in asking the court to exercise its powers of revision, the accused must

come with cleans hands in that the matter complained of is truly tainted with illegality, incorrectness or impropriety. The accused cannot abuse the process of law to merely vent a dissatisfaction.

[14] As demonstrated in the case of *Ong Seh Sen v Public Prosecutor* [2010] 7 CLJ 220 the court refused to exercise its powers of revision as the court found that there was no instance of miscarriage of justice that justified the court's intervention. The accused was represented by counsel when he pleaded guilty, he understood and agreed to the facts of the charge and there was even a lengthy mitigation on sentence. Despite having included in his petition of appeal a challenge on the legality of the conviction, that issue was abandoned by the accused's own choice at the hearing of the appeal. Thus, the court held that the accused's application for revision was an attempt at resurrecting a ground of appeal that was abandoned by the accused. As described by the court:

> [18] ... It has come to the fore that he is now trying to resurrect a ground that he had abandoned during his appeal against sentence. In any case, he would be barred from appealing against his conviction on his own plea of guilty by virtue of s 305 of the CPC. Still, he could have urged this court to invoke its discretion to revise the conviction since it had come to be in the 'cognisance' of this court. What had since become apparently clear as well is the fact that he was blowing hot and cold at his whim and fancy. I do not believe that this court ought to accede to and appease his present desire to retract his plea of guilty. In the case of *Teo Hee Heng v Public Prosecutor* [2000] 3 SLR 168, the court had said: 'It is certainly not the purpose of a criminal revision to become a convenient form of 'backdoor appeal' against conviction for accused persons who had pleaded guilty to their charges'. In this case, this applicant had pleaded guilty to the alternative charge before the SCJ for which he had been convicted, he had appealed against such sentence which was dismissed by me, he had since filed an appeal to the Court of Appeal therefrom which is now pending and with these as a backdrop, he had filed this application for revision. Looking at the course that had been charted by this applicant and in the manner in which he had 'conducted' himself in this case, he was very close to fulfil what Chief Justice Yang had described as an unmeritious applicant. Such circumstances to my mind do not merit nor could they justify this court in exercising its discretionary powers of revision.

[15] Returning to the question whether this court is functus officio, this court would answer in the negative because application is made on an issue that was not ventilated and decided upon at the first appeal. The issue of legality of the plea of guilty and the ensuing conviction was only identified at the second appeal by a new counsel. The application therefore became necessary as a step in aid to bring to the attention of this court of the injustice that had taken place before the trial court and to invoke the revisionary powers of this court. The argument in favor of saying that this court was already functus officio after the first appeal was heard is therefore without persuasive merit.

[16] In any event, in this court's view the decision of the High Court in case of *Chandrasegaran Sunthiran* referred to by learned deputy prosecutor is clearly distinguishable from the present case where in that case, the court held that it was functus officio because the case had been finally adjudged by the Federal Court. The court held:

> [22] In the upshot, the matter is res judicata as far as the criminal case against CS is concerned. The case is already judged and final judgment of the Federal Court is conclusive against him. On this doctrine, Brett MR in the case of *Re May* [1885] 28 Ch D 516, decided:
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> > It is a very substantial doctrine, and it is one of the most fundamental doctrines of all courts that there must be an end to all litigation, and that the parties have no right of their own accord, having tried a question between them, and obtained a decision of a court, to start that litigation over again on precisely the same question.
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> It was also decided in the Privy Council case of *Sambasivam v The Public Prosecutor, Federation of Malaya* [1950] 1 MLJ 145; [1950] 1 LNS 80 at p 151, that the maxim 'Res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings.
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> The above resonates the fact that in every criminal trial, like as the one involving the applicant, there are two issues. They are, whether or not a crime has been committed and, whether or not the accused person committed it. In the case of the respondent, it has been proved beyond reasonable doubt that it is him who had used the name MS, who had committed the murder as charged and likewise the High Court at Taiping, a court of competent jurisdiction which had tried him for that offence, had found him guilty, convicted and sentenced him to death according to law. Further, the said conviction and sentence had survived the appeal process, whereby the apex court upheld the said conviction and sentence.
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> [23] Corollary to that, this court is functus officio, as it had finally disposed of the rights of the respondent when the conviction was ordered and death sentence pronounced and ultimately upheld by the Federal Court. Hence, this court, being the lowest in the hierarchy of the superior courts under the Courts of Judicature Act 1964 (Act 91), lacks legal competence to deal with the matter again as the apex court had put the matter to rest, when it had dismissed the appeal by the respondent against conviction and sentence.

Whether a revision can be filed when there is an appeal pending

[17] In this court's view, since a revision is a step in aid and is not a continuation of the trial or appeal as held in *Tan Sri Eric Chia*, then there should not be any impediment for the application to be filed even when there is an appeal pending provided that the application is made bona fides to correct a miscarriage of justice. In relation to this issue, it would be imperative for this court to address the decision in *Ong Seh Sen* as the High Court there had, following the Court of Appeal decision in *Sukma Darmawan Sasmitaat Madja*

v Public Prosecutor [2007] 5 MLJ 666; [2007] 4 CLJ 697, dismissed the application for revision on the basis that, inter alia, that there was a pending appeal.

[18] In *Ong Seh Sen* the accused had pleaded guilty before the sessions court for an offence under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Being dissatisfied with the sentence of RM1m fine, in default 12 months imprisonment, the accused then appealed to the High Court. At both levels of the proceedings the accused was represented by counsel. In his petition of appeal to the High Court the accused had raised an issue relating to the legality of his conviction but at the hearing of the appeal the accused chose to abandon the issue and merely focused on the legality of sentence. The High Court thus decided only on the issue of sentence, the appeal was dismissed and the sentence by the sessions court was affirmed. The accused sought to fight another battle on the issue and filed an appeal at the Court of Appeal. Whilst the appeal was still pending the accused being represented by a different counsel at that time filed an application for a revision of the decision of the sessions court premised on the issue of legality of conviction. The issue that arose was whether the High Court could hear the application as it amounted to a review of the High Court's own decision.

[19] In dismissing the application, the court there referred to what was said to be the views expressed by Gopal Sri Ram J in *Sukma Darmawan Sasmitaat Madja*:

> [14] Then there is another reason why this application ought not be entertained. That reason resides in a decision of our apex court in the case of *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170; [1979] 1 LNS 81, where it was held that where there is an appeal pending regarding a criminal matter in a higher court, there ought not to be a review or a revision of the same by the same court which order is being impugned. The principle in this case was cited and applied in a broader sense in the case of *Sukma Darmawan Sasmitaat Madja v Public Prosecutor* [2007] 5 MLJ 666; [2007] 4 CLJ 697 by learned Justice Gopal Sri Ram JCA, when he had declined the invitation by the appellant to invoke his power of revision because the learned Justice was cognizant of the fact that 'Dato' Seri Anwar Ibrahim has been charged with an offence for the same act'. As such His Lordship proceeded on to say at p 713 'I conclude it is wrong to consider a revision at this point in time. In *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170; [1979] 1 LNS 81 (FC), it was held that where there is an appeal to the Federal Court, an application by that person for review will be dismissed. A similar principle should apply although the accused in the Criminal Trial 45–52–98 is a different person because both cases arise from the same event, and the truth is best determined in a full trial. I would therefore refrain from undertaking such a course'. The facts in the case before me had involved the same person (as accused person/appellant/applicant) and thereby presenting a more compelling rationale for the ratio in *Soon Seng*'s case to apply here in full force. That being the case, it would appear that this application would be a

non-starter bearing in mind that there is an appeal pending in the Court of Appeal presently. A

[20] However, a closer reading of the decision in *Sukma Darmawan Sasmitaat Madja* reveals a different perspective on the matter. Referring first to the facts of the case in *Sukma Darmawan Sasmitaat Madja*, the accused there was convicted and sentenced for the offence of gross indecency. An appeal was filed. The petition of appeal was filed out of time and an extension was not granted by the High Court. The accused then filed an application for revision with the view of attacking the legality of the conviction. That application was dismissed by the High Court on grounds, inter alia, that since there was an appeal pending that involved the conviction of the accused and another person in a different trial, the court ought not to hear the application. B C

[21] In the grounds of decision of the Court of Appeal, part of the grounds of judgment of the High Court was reproduced. This appeared beginning from para 11 until para 18 of the Court of Appeal's grounds of decision. That part of the Court of Appeal's decision is reproduced below. The parts in bold and in italics shows the Court of Appeal's reference to an excerpt of the High Court's judgment: D E

> [11] Now for the second reason. One of the grounds advanced by the accused in support of his application for revision was that his plea of guilt was involuntary in that it was not the product of a free mind but that of a mind tainted by oppression and coercion brought to bear on it by the police in whose custody he was for a period of 14 days immediately preceding his appearance before the sessions court ... F
> **The learned judge dealt with this part of the case as follows:**
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> ***In Public Prosecutor v Audrey Keong Mei Cheng [1997] 3 MLJ 477; [1997] 4 CLJ 702 , the following passage appears in the judgment of the Court of Appeal:***
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> > ***Before leaving the subject, we would like to make one other observation. During the proceedings before the High Court, a number of affidavits were filed both by the prosecution as well as by the respondent for the consideration of the learned judge. In exercising his power under s 325 of the CPC, the learned judge has to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court. In order to do this, he has to examine the record of the proceedings of which has been called for by himself or, as in this case, which otherwise comes to his knowledge. In exercising his discretion, the learned judge ought to confine himself only to the record of the proceedings and nothing else.*** G H I
> >
> > ***An application for revision being essentially a criminal proceeding, it is our view that affidavit evidence has no place in such proceedings.***
>
> ***Public Prosecutor v Audrey Keong Mei Cheng is authority that affidavit***

evidence has no part in revision proceedings. Indeed no party has a right to be heard in revision proceedings: see s 326 of the Code. In Lee Boon Gan v Regina [1954] MLJ 103; [1954] 1 LNS 39, Spenser Wilkinson, J stated the principle in the following words:

> ***Although I can find no direct authority on the subject I am of opinion that for the purposes of an appeal the record is conclusive.***
>
> ***Counsel for the appellant suggested that under my revisionary powers I could receive affidavit evidence in regard to this matter and affidavits were, in fact, filed by the appellant, her husband and a friend of hers and a counter affidavit was filed by the court interpreter.***
>
> ***Whilst I am not prepared to say, as at present advised, that there are no circumstances in which the accuracy of the record can be gone into on revision, particularly under the very wide powers of revision now given to High Court by s 57 of the Courts Ordinance, 1948 I did not think that this was a case in which this could or should be done. Moreover, I know of no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal or upon a criminal revision unless so ordered by the High Court.***
>
> ***There are circumstances in which certain applications can be made in appeals by motion in which case it should be proper to file affidavits in support of the motion, but in my opinion affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.***

It is evident then that the application as it stands, that is, for the Court to act in revision and set aside the conviction and sentence is misconceived. The error is apparent from a careful reading of Public Prosecutor v Muhari bin Mohd Jani & Anor [1996] 3 MLJ 116; [1999]8 CLJ 430. The applicant must first be able to show an ex facie case for the exercise of revision to be undertaken. Thus the application ought to be to apply to the court to call for and examine the record under s 323 of the Code and to exercise its power under s 325 to make an order under s 317 of the Code to take further evidence. Only upon the carrying out of the revisionary exercise may the decision then be made to set aside the conviction and sentence or to make any other order as circumstances may require.

The allegations in the affidavit of the applicant were denied by Mohamed Noor bin Dom, the advocate purportedly appointed by the police; ASP Ahmad Kamil bin Dato' Ahmad; SAC Musa bin Hj Hassan; ASP Mohd Radwan bin Hj Mohd Yusof and C/Insp Sampornak bin Ismail. These affidavits were filed on 18 December 1998. Given however that affidavits of Dato' Seri Anwar Ibrahim and that of Dr Zahari bin Noor were filed on 31 December 1998 and 22 January 1999 respectively supporting the affidavit of the applicant filed on 10 December 1998, and giving these latter affidavits a liberal interpretation, I conclude that at the very least the matters remain at issue. It is important to remember that affidavit evidence serves a very limited purpose, that is for setting out sworn testimony, and the court may

make findings only to the extent a fact is admitted or not disputed, which differs from oral testimony tested by cross-examination where the court is in a position to assess credibility and to make a finding. In view of the fact the assertions in the affidavit evidence that the applicant has elected to proceed upon is disputed, the court must rule the allegations are not proven and cannot therefore justify ordering the conviction and sentence to be set aside as applied for.

Since the application is before me, and notwithstanding that the application as currently formulated is misconceived, I have proceeded further to consider whether I, as a judge, should act under Chapter XXXI of the Code and order that a revision be commenced. However, taking into account that Dato' Seri Anwar Ibrahim has been charged with an offence for the same act, and that the case is pending trial in the High Court in Criminal Trial 45–52–98, I conclude it is wrong to consider a revision at this point of time. In Public Prosecutor v Soon Seng Sia Heng [1979] 2 MLJ 170; [1979] 1 LNS 81 (FC) it was held that where there is an appeal to the Federal Court, an application by that person for review will be dismissed. A similar principle should apply although the accused in Criminal Trial 45–52–98 is a different person because both cases arise from the same event, and the truth is best determined in a full trial. I would therefore refrain from undertaking such a course.

[12] The learned deputy sought to support the above ruling by the learned judge. With respect we are unable to agree with her submissions and would make the following comment.

...

[15] In the second place, our Supreme Court in *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35; [1987] CLJ Rep 163 held that revisionary powers conferred by the CPC exist to correct a miscarriage of justice. This is what the Supreme Court said:

> We would also observe that the object of the revisionary powers provided for in the Code is:
>
> > ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals. (*Emperor v Nasrullah and Ors* AIR 1928 All 287).
>
> It is also clear that the High Court may examine the record of proceedings in the subordinate courts 'wherever it considers that in doing so the purpose of justice will be served, as for example, accused is subjected to a vexatious and groundless prosecution' (*Ramanathan Chettiyar v K Sivarama Subrahmanya Ayyar* (1924) ILR 47 Mad 722).

[16] Further, in *Goh Keat Peng v Public Prosecutor* [2001] 3 MLJ 172; [2001] 2 CLJ 498, our learned brother Zulekfli J (as he then was) said:

A It is to be noted that the relevant provisions of the CPC and the Act (ie, the Courts of Judicature Act) have been enacted with the primary purpose of ensuring **proper conduct of the prosecution of an offence and to prevent injustice meted out on any party**. (Emphasis added.)

B We agree.

[17] Let us apply these observations to the present instance. Here we have a case of an improper conduct of a prosecution by the intentional suppression of evidence favourable to the defence. And there can be no clearer case of an injustice where the plea of guilt is alleged to have been induced by illegitimate pressure. Statute apart, C the interests of justice plainly lie in favour of permitting the admission of affidavit evidence and on the facts here directing cross-examination of the deponents of the affidavits filed in opposition to the motion for revision. Accordingly the submission by the learned deputy that affidavits are inadmissible in revision proceedings even to demonstrate a miscarriage of justice cannot be accepted. More so in this case where D the prosecution itself had said that it had no objections to the deponents of affidavits filed on the public prosecutor's behalf.

[18] Now, although the learned judge in the present instance mentioned s 35(1) of the Courts of Judicature Act, a reading of the judgment under appeal leaves with the impression that he did not really appreciate the nature and object of the wider E supervisory jurisdiction conferred on the High Court by that section. For, in his judgment, he appears to have focussed almost entirely on the CPC and not sufficiently appreciated the wider jurisdiction conferred by s 35(1). In our judgment, the supervisory jurisdiction of the High Court conferred by s 35(1) exists to correct a miscarriage of justice. And it is central to the exercise of that power that an applicant be permitted to bring matters of complaint to the High Court by way F of affidavit evidence. What was canvassed by the learned deputy and accepted by the learned judge was a very narrow approach to the nature of the jurisdiction that was being invoked. Such an approach will render the beneficial provision in s 35(1) a dead letter.

G **[22]** Referring to para 14 of the decision in *Ong Seh Sen*, it is therefore apparent that what the court had referred to was actually the excerpt of the High Court's decision as reproduced by the Court of Appeal and not the *raison d'etre* of Gopal Sri Ram JCA himself. Hence, the correct perspective of the decision in *Sukma Darmawan Sasmitaat Madja* is that the Court of Appeal H speaking through Gopal Sri Ram JCA had actually disagreed with the decision of the High Court on the issue of revision. In fact, the Court of Appeal allowed the appeal and quashed the conviction and sentence against the accused. Although, the issue considered by the Court of Appeal was not whether the High Court had the power to hear the revision but whether the use of affidavit I evidence should have been permitted, yet the Court of Appeal entirely disagreed with the High Court's reasoning in refusing to exercise its revisionary powers including the consideration that there was a pending trial involving the accused and another person. Since the Court of Appeal in *Sukma Darmawan Sasmitaat Madja* did not hold that an application for revision cannot be filed

when there is an appeal pending, it cannot therefore be taken as an authority on the issue. In addition, the Federal Court decision in *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170; [1979] 1 LNS 81 referred to by the High Court in *Sukma Darmawan Sasmitaat Madja,* was not presented with any issue of miscarriage of justice and thus, the facts are distinguishable. In that case, the review was made pursuant to s 10 of the Internal Security Act and not s 325 of the Criminal Procedure Code.

[23] On that basis, this court holds the view that there is no bar to this court in hearing the merits of the application notwithstanding that an appeal is pending and that appeal seeks to impugn the decision of this court. What is evident from the deliberation of Gopal Sri Ram JCA in *Sukma Darmawan Sasmitaat Madja* is that the fundamental consideration by the Court of Appeal in disagreeing with the High Court was that there was a miscarriage of justice and that miscarriage had to be corrected. That consideration must also similarly apply to the present case.

Has there been a miscarriage of justice in the present case

[24] As stated in the earlier part of this grounds of judgment, the complaint raised by the applicant is that when the plea of guilty was recorded and accepted by the sessions court, the facts of the case and charge admitted to by the applicant did not disclose the elements of the offence under s 326 of the PC in that there was no fact of the hurt inflicted on the victim aside from stating that the victim was stabbed with a pair of scissors and there was also no fact or statement that the hurt inflicted was grievous. In addition, no medical report was offered to the sessions court to prove that the hurt inflicted on the victim was grievous within the definition of s 320 of the PC and which would justify a charge under s 326 of the PC. Further to that, there was no evidence that the victim fell within the class of persons defined under s 326A of the PC to justify the enhanced punishment as provided therein.

[25] At the hearing of this application, learned deputy public prosecutor candidly conceded that those facts and evidence were absent. It is plain therefore that the sessions court had fallen into error in accepting the accused's plea of guilty. There was therefore a miscarriage of justice and that miscarriage must be corrected.

[26] It is pertinent, at this point to quote what was held by the court in *Public Prosecutor v Ismail bin Ibrahim* [1998] 3 MLJ 243 in relation to the duties of the court before accepting the plea of guilty of an accused:

> The procedure to be followed by a magistrate before sentencing an accused who has pleaded guilty to the offence with which he has been charged is laid down in s 173(b) of the CPC which reads as follows:

> If the accused pleads guilty to a charge whether, as originally framed or as amended, the plea shall be recorded and he may be convicted thereon and the Court shall pass sentence according to law:
>
> Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

This provision makes it manifestly patent that while it is the right of an accused person to plead guilty to a charge preferred against him, the court has an overriding duty to decide whether to accept the plea. The authorities governing the exercise of this function by the court are now legion and I have reviewed most of them in *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65; [1997] 1 CLJ Supp 485. The use of the words 'shall ascertain' in the proviso to s 173(b) of the CPC make compliance with the guidelines mandatory (see *Public Prosecutor v Leng Chow Teng* [1985] 1 MLJ 229). In *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143, it was held that in order to determine the validity of a plea of guilty, certain safeguards must be followed. They are, inter alia, as follows:

(i) the court must ascertain that the accused understands the nature and consequences of his plea; and

(ii) the court must ascertain that the accused intends to admit without qualification the offence alleged against him.

Although a plea of guilty is a confession of guilt, it does not of itself amount to a conviction. A conviction does not occur until there is an acceptance of the plea amounting to a determination of guilt by the court (see *Maxwell v R* (1996) 135 ALR 1). Thus, upon a guilty plea, the court requires a summary of the facts of the case to ensure that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. The facts given should be confined to facts which the prosecution is able to prove and which are necessary to establish the charge (see *Chen Chong & Ors v PP* [1967] 2 MLJ 130 and *Abdul Kadir bin Abdul Rahman v Public Prosecutor* [1984] 1 MLJ 80). It enables the court to ascertain whether admission of the facts amounts to a plea of guilty in law (see *Palan v Public Prosecutor* [1932] MLJ 124; *Public Prosecutor v Nahat Singh* [1939] MLJ 239; *Tukiran bin Taib v Public Prosecutor* [1955] MLJ 24; and *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27). It is the duty of a magistrate to defer acceptance of a plea of guilty until he has the facts alleged by the prosecution fully before him (see *Public Prosecutor v Yong Chen* [1952] MLJ 142). The court accepts a guilty plea when it is satisfied that the accused understands the nature and consequences of his plea. This will be done after the accused has admitted the facts (see *Public Prosecutor v Abdul Aziz* [1978] 2 MLJ 155 and *Lian Kian Boon v Public Prosecutor* [1991] 1 MLJ 51). The court is not bound to accept a plea of guilty in all cases. The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in unmistakable terms with full appreciation of the essential terms of the offence (see *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30). The plea should not be accepted by the court where on the facts admitted an accused person could not in law have been guilty of an offence (see *R v Forde* [1923] 2 KB 400; *R v Murphy* [1965] VR 187; *R v Chiron* [1980] 1 NSWLR 218; *R v Barnes* (1970) 55 Cr App R 100; *Sau Soo Kim v Public*

Prosecutor [1975] 2 MLJ 134; and *Lo Kim Peng & Ors v Public Prosecutor* [1979] 1 MLJ 249).

[27] In a very recent decision of the Court of Appeal in *Shaiful Azmi bin Sabri v Pendakwa Raya* [2020] MLJU 1214 the court held that the accused could not have taken to have unequivocally pleaded guilty to the charge under s 68(1)(a) of the Dangerous Drugs Act 1952 when, inter alia, the facts of the case and the charge failed to disclose the fact that the accused had planted the cannabis and the weight of the cannabis. The court expressed the view that it was the trial court's duty to ascertain the facts of the case that served as the basis of the charge.

[28] As also stated by KC Vohrah J in the case of *Public Prosecutor v Margarita B Cruz* [1988] 1 MLJ 539; [1987] 1 LNS 129:

> ... when the prosecuting officer gives the facts relating to the charge implicating the accused where the accused has pleaded guilty, the magistrate should be vigilant to see that the facts make out the ingredients relating to the charge and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the magistrate should reject the plea and fix a date for evidence to be adduced at a trial.

CONCLUSION

[29] Therefore, this court is satisfied that based on the facts of this case, there was indeed a miscarriage of justice occasioned on the applicant. Notwithstanding that an appeal against the issue of sentence in this case is pending in the Court of Appeal, to ignore that sorry state of affairs that led to his conviction would amount to denying the applicant's rightful access to this court's powers of revision. This court cannot renege on its duty to ensure that justice is administered in conformity with the tenets of the law. The exercise of this court's powers of revision fits the purpose of step in aid and must be exercised in favor of the applicant.

DECISION

[30] In the exercise of the powers of revision of this court, the conviction and sentence against the accused is hereby set aside. This case is ordered to be remitted back to the sessions court for retrial.

Application for revision allowed; conviction and sentence set aside; and case remitted back to sessions court for retrial.

Reported by Mohd Kamarul Anwar